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No. _____

In The
Supreme Court of the United States
October Term, 1999

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMMENT; AND CITY OF MEMPHIS, TENNESSEE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

1. Where a plaintiff-landowner seeks relief from a regulatory taking of its property and, as required by this Court's holding in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), proceeds to "ripen" its case by first seeking (and being denied) compensation in the state courts before seeking relief under 42 U.S.C. § 1983 in federal court, may a U.S. District Court nonetheless dismiss such an action on the ground that the very process of "ripening" the case in the state court litigation — in the manner required by *Williamson County* — simultaneously works to bar it under the doctrine of *res judicata*?

2. *A fortiori*, may a U.S. District Court so rule where it is conceded in open court that, in depriving the plaintiffs of their constitutional rights, the defendant municipality acted "arbitrarily, capriciously, and illegally" and where the municipality "in essence . . . stipulated that [it] had violated plaintiff's rights under both the Tennessee and United States Constitutions" (App. B, p. 8)?

3. Was it this Court's intention in *Williamson County* to single out American property owners as the *only* class of plaintiffs whose 42 U.S.C. § 1983 claims may *never* be heard in federal court, because the required process of "ripening" their causes of action in state court simultaneously serves to bar them from federal court, as held by the court below, which thereby intensifies a wide-ranging conflict of decisions in which the 3d, 6th, 9th, and 10th Circuits disagree with the 4th, 5th, and 11th Circuits?

PARTIES TO THE PROCFEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Rainey Brothers Construction Company, Inc. has neither parent nor subsidiary companies.

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TABLE OF AUTHORITIES

Table of Cases **Page(s)**

Abingdon School Dist. v. Schemp,
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Table of Cases **Page(s)**

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Table of Authorities **Page(s)**

Publications:

DeLaney & Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urban Lawyer 195, 198 (1999) 22

DeLong, *Property Matters*, 296 (Free Press 1997) 10

Fischel, *Regulatory Takings* 55 (Harvard U. Press 1995) 22

Kassouni, *The Ripeness Doctrine and The Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West L. Rev. 1 (1992) 17

Laitos, *Law of Property Rights Protection*, §10.05[A], (Aspen Publishers 1999) 17, 25

Mandelker, Gerard & Sullivan, *Federal Land Use Law*, §4A.02[6] (Clark, Boardman, Callaghan 1998) 18

Meltz, Merriam & Frank, *The Taking Issue*, 67 (Island Press 1999) 17

Table of Authorities

Page(s)

Publications, continued:

Roberts, *Ripeness and Forum Selection in Land-Use Litigation in Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, (ABA, Callies ed., 1996) 8, 19

Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995) 10

Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urban Lawyer 177, 187 (1999) 19

Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book*, 413 (Scribners 1945) 10

Legislative Material:

Mandelker, Prof. Daniel R., *House Judiciary Committee*, reproduced in full at 31 Urban Lawyer, 234 (1999) 17, 28

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rainey Brothers Construction Company, Inc. respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit was filed on April 5, 1999 and was not recommended for publication. (Appendix A.) The trial court's decision was filed on June 18, 1997, and reported as *Rainey Brothers Construction Company, Incorporated v. Memphis and Shelby County Board of Adjustment*, 967 F. Supp. 998 (W.D. Tenn. 1997). (Appendix B.) The trial court's unpublished judgment was filed on June 19, 1997. (Appendix C.)

JURISDICTION

This case arises from the lower courts' refusal to follow this Court's decision in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), and try the merits of Rainey Brothers' 5th Amendment regulatory takings and 14th Amendment due process claims after Rainey Brothers had duly "ripened" its case by seeking — and being denied — compensation in the Tennessee courts, precisely as required by *Williamson County*. That process took time, but — as became apparent in the recent decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), recounting an 18-year odyssey through the planning and litigation process — regulatory taking cases can be time consuming.

The issue of how lower federal courts are to apply *Williamson County* is presented here in an intriguingly pure form: *there is no question of federal constitutional liability — it is admitted; the only question is whether these concededly damaged property owners may obtain their constitutional remedy in any court.* The issue is starkly framed because the governmental

defendants *stipulated* that they had violated Rainey Brothers' constitutional rights. As the District Court put it:

> "On the first day of the trial [in state court], the City Attorney, representing the City and the Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally . . . [and] [i]n essence, defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions." (App. B, p. 8.)

Notwithstanding this concession of liability, and the state trial court's consequent finding that the governmental actions were "void, capricious, arbitrary and illegal" (App. B, p. 8), the state court refused to award Rainey Brothers *any* compensation (App. B, p. 8) because of its erroneous belief that the state's tort claims act immunized the government from any compensatory judgment (App. B., p. 19), and also refused to order reinstatement of the wrongfully rescinded permits, thus purporting to "uphold" their rights with empty words, while denying them any remedy whatever.[1]

After unsuccessfully appealing the state court denial of compensation, Rainey Brothers filed suit in U.S. District Court under 42 U.S.C. § 1983 to recover compensation for the deprivation of its property without due process and the taking of its property without just compensation, precisely as required by *Williamson County*. But the District Court dismissed the action on the ground that the concededly wrongly decided Tennessee proceedings were *res judicata*. The 6th Circuit affirmed.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] In their 6th Circuit brief, the City and the Board conceded that "the state court *incorrectly* held that no monetary award would be granted because Tenn. Code Ann. § 29-20-205 precluded such an award..." (Final Br. of Appellees p. 30; emphasis added.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 5th and 14th Amendments to the United States Constitution, along with pertinent federal and state statutes and rules, are reproduced in Appendices D - Q.

STATEMENT OF THE CASE

The run-around to which the Rainey Brothers company was subjected is reminiscent of that described recently by this Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), with one stunning exception: here, the governmental wrongdoers *stipulated* that they violated the property owner's constitutional rights, and conceded that they wrongfully took the very actions that gave rise to this constitutional claim. (App. B, p. 8, quoted above.) Thus, there was never any contested issue of liability: the only issue was the availability of a remedy — any remedy — for a *conceded* constitutional violation. Yet, so far, both the state and federal judiciaries have refused to provide any remedy whatever. Before parsing the procedural path (dare one say, "shell game"?) followed by the lower courts to achieve that ignominious end, a brief recitation of the underlying facts is in order.

Rainey Brothers bought a 14-acre parcel of vacant land in Memphis, Tenn., which it intended to develop for residential use. Initially, it presented a preliminary plan to the City for single-family homes. Upon being informed that the property would have to be filled, in order to raise the minimum building elevation, Rainey Brothers concluded that the added cost made single-family homes infeasible, and opted instead for multi-family dwellings. Its request for a rezoning to R-4, to permit construction of 432 apartment units, was rejected; but later, the city approved rezoning to R-3A, which would permit 244 apartment units. Relying on that, Rainey Brothers sought a building permit for a 244-unit apartment project. (App.B, pp.2-3.)

At that point, things took a turn for the ugly. The City's mayor was apparently opposed to the project, and illegally

"instructed" the building department not to issue the permit, notwithstanding Rainey Brothers' clear legal right to the permit under R-3A zoning. The building department complied with the mayor's instructions, rather than the law. (App. B, p. 3.)

On appeal (exhausting all administrative remedies), the Board of Adjustment ruled that a permit must issue, but gave Rainey Brothers permission to construct only 165 apartment units, rather than the 244 permitted by the zoning. (Compare *Del Monte Dunes.*, 119 S.Ct. at 1632.) Additionally, the Board required the buildings to be constructed at a higher elevation (i.e., above the existing grade). Later, the Board granted Rainey Brothers a variance reducing the required elevation by several feet. (App. B, pp. 3-4.)

Taking a cautiously conservative approach, Rainey Brothers waited 60 days (the time, under local law, for anyone to challenge the variance) before taking any action. When no challenge materialized and the variance became final, Rainey Brothers entered into contracts with engineers, materialmen, suppliers, and plumbers for construction of its project. It also obtained inspections and approvals from the appropriate City departments, and arranged financing. Concrete slabs were poured and framing for the buildings was constructed at substantial cost. (App. B, p. 4.)

Seven months after Rainey Brothers obtained its variance and building permits and made substantial commitments and substantial progress in construction, a complaint was made to the Board that the variance should not have been granted, although by then Rainey Brothers' rights under the variance had vested under state law. (See *State ex rel. SCA Chem. Waste Serv., Inc. v. Konigsberg*, 636 S.W.2d 430, 437 [Tenn. 1982]; *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 906 [Tenn. 1940].) *Without giving Rainey Brothers any notice or opportunity to be heard*, the Board summarily and *ex parte* revoked the variance, reinstated the higher building elevation requirement, and left

Rainey Brothers with a significant part of its project already constructed at what had just retroactively become an illegal elevation. The Board's action required Rainey Brothers to tear out the construction, bring in tons of dirt to fill the land to raise its elevation, and begin anew, all at enormous additional expense. (App. B, p. 5.)

After the Board denied Rainey Brothers' petition for "rehearing" (which, because of the lack of notice of the original action, would have been Rainey Brothers' only hearing), the City revoked all permits previously issued. (App. B, p. 5.)

That's when Rainey Brothers sued.

The City and the Board knew they had done wrong, but they nonetheless forced Rainey Brothers to litigate. Forcing them into court was one thing, however; actually trying the case on the "merits" (if that term may be used here without doing violence to the English language and to the rudiments of due process) was something else. As the state court trial began, counsel for the City and the Board confessed his clients' constitutional wrongdoing. The City and the Board, he conceded, "had acted arbitrarily, capriciously, and illegally." (App. B, p. 8.) "In essence," the U.S. District Court would later summarize, "defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions." (App. B, p. 8.)

That concession resulted in a state trial court determination that the actions of the City and the Board were "void, capricious, arbitrary, and illegal . . . ." (App. B, p. 8.) Nonetheless, although voiding the City and Board orders that revoked Rainey Brothers' permits, the court failed to order the permits reinstated, leaving Rainey Brothers as bad off after receiving this illusory "relief" as it was before. On top of that, the court refused to award any compensation for the impact of these void governmental acts because it erroneously concluded — as a matter of law — that Tennessee's Governmental Tort

Liability Act barred monetary recovery. (App. B., p. 8.)[2] This was a remarkable ruling, considering this Court's determination in *Williamson County* — another case from Tennessee — that Tennessee land owners have an available remedy under state law to compensate for regulatory takings. (*Williamson County*, 473 U.S. at 196.) Thus, in the teeth of admittedly unconstitutional treatment by the City and the Board, Rainey Brothers received no meaningful relief from the Tennessee courts.

Once the state court proceedings were concluded, the matter should have been "ripe" for federal court litigation, as dictated by this Court's decision in *Williamson County*.

Rainey Brothers therefore filed this suit in U.S. District Court, under 42 U.S.C. § 1983, seeking compensation for the denial of its rights to due process and just compensation. Under this Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 305 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as recently confirmed in *Del Monte Dunes*, 119 S.Ct. at 1639, the complete prohibition of Rainey Brothers' use of its property from

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[2] Earlier, the trial court had dismissed Rainey Brothers' amended complaints that sought to clarify its state and federal constitutional claims. The basis for that ruling was the trial court's belief that, under Tennessee law, the amendments would not "relate back" to the date the original complaints were filed because the original complaint failed to give "notice" of these claims to the City and the Board. That conclusion, although affirmed on an interlocutory appeal, *was agreed by all to be an erroneous application of state law*. (App. B, pp. 18-19, fn. 6.) (In their 6th Circuit brief, the City and the Board conceded that the state appellate court had "misinterpreted" Tennessee law. [Final Br. of Appellees, p. 22.]) Because of that ruling, the trial court refused to consider any constitutional compensation for the conceded constitutional violations. The appeal was dismissed by the state appellate court for failure to timely file the transcript. Although the transcript was proffered in response to an order to show cause and thus should have been filed, it is clear that its presence or absence was immaterial. As the state courts had already (erroneously) determined that Rainey Brothers could not amend its complaints to seek constitutional compensation, the result of the appeal was foreordained. The only forum for relief was the U.S. District Court.

the time the City and the Board revoked its permits entitled Rainey Brothers to just compensation for the time that prohibition remained in effect.

Rather than providing compensation for this unconstitutional denial of all economically beneficial or productive use of the subject property, however, the District Court dismissed the action. It accepted the argument of the City and the Board that the concededly error-riddled proceedings in the state courts were *res judicata*, thus precluding Rainey Brothers from ever litigating the merits of its suit — regardless of what this Court may have said to the contrary in *Williamson County*.

In a peremptory fashion, the 6th Circuit affirmed. Thus, this Petition.

SUMMARY OF ARGUMENT

Although undoubtedly well-intentioned, this Court's 1985 decision in *Williamson County* has been a source of intense confusion among lower courts, practitioners, commentators, and litigants. The problem highlighted by this Petition is the prevailing chaos surrounding the relationship between *Williamson County* and the familiar rules of *res judicata* and collateral estoppel. It can be worse than chaos; in many cases, it's a trap. Here's how the *Williamson* trap works:

- *Williamson County* clearly held that a property owner's suit seeking compensation under the 5th Amendment for a regulatory taking or under the 14th Amendment for deprivation of property without due process of law is "premature," and cannot be brought in U.S. District Court "until" the owner first seeks, and is denied, compensation in state court.
- However, when property owners do as *Williamson County* requires and sue in state courts — as Rainey Brothers did at bench — they are met in some Circuits with the argument that the state court litigation, far from "ripening" the federal cause of action, as this Court held

> in *Williamson County*, has instead extinguished it supposedly because the state proceedings are *res judicata*, and that bars the pursuit of the now-"ripened" federal action. Thus, under these courts' reasoning, the very act of "ripening" a case also ends it. That "rule," with all due respect, cannot be what this Court intended in *Williamson County* because it is inherently nonsensical and self-stultifying.

One distinguished law professor put it precisely, if a bit colloquially:

> "One understandable reaction to the prong two requirement of [*Williamson County*] is that it perpetrates a fraud or hoax on landowners. The courts say, 'Your suit is not ripe until you seek compensation from the state courts,' but when the landowner does these things, the court says, 'Ha ha, now it is too late.'" (Roberts, *Ripeness and Forum Selection in Land-Use Litigation* in *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, ch. 3 at 67 [ABA, Callies ed., 1996] [hereafter Roberts, *Fifth Amendment*].)

The Circuit Courts are manifestly confused and contradict each other in their approaches to this problem. Some, like the court below, hold that the state proceedings are *res judicata*, so that property owners can *never* achieve the "ripeness" foretold in *Williamson County*. Their belief is that, once the property owner sues in state court, that ends the matter and there can never be any federal litigation.[3] Others have sought to temper the harsh

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[3] See also *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3d Cir. 1989).

impact of issue and claim preclusion rules by permitting the property owner to overtly split a claim by filing a notice in the state court to that effect,[4] or by treating the acquiescence of the state court and the defendant as preserving the issue for federal court litigation.[5]

However, there is no consistency from Circuit to Circuit. The *Williamson* trap came into being as lower courts struggled to understand how this Court's unique requirement that property owners first seek redress in state courts melded with the familiar concepts of claim and issue preclusion. The lower courts have produced no answers — only conflict of decision and doctrinal confusion.

This Court's guidance is urgently needed. Lower federal courts need to know how to apply *Williamson County*. They, and the litigants, need to know definitively whether this Court's statement that federal action is "premature" "until" redress has been sought *and denied* in state court means that property owners can really file suit in U.S. District Court and expect to go to trial on the merits after they have sued and lost in state court. This seems particularly important in a case like this one in which the state court loss was on admittedly *erroneous procedural* grounds, with the state courts never reaching the merits of the dispute,

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[4] *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

[5] *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995) (*Dodd I*). This was the first of two appeals in *Dodd*. In the second, the 9th Circuit executed what could be viewed as a "bait and switch" maneuver. Acknowledging its earlier holding that the Oregon courts had reserved federal claims for federal court determination (the bait), the 9th Circuit nonetheless held that issues determined in the state court proceedings precluded Mr. and Mrs. Dodd from litigating their federal constitutional claims (the switch). *Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998) (*Dodd II*).

even though the defendants' violations of the Constitution were conceded by them in open court.

One commentator concluded that, ". . . the *Williamson County* . . . ripeness requirements have as often been used by localities as a sword rather than as a shield." (Eagle, *Regulatory Takings*, § 15-4(b)(4), p. 639 [Michie Law Publishers 1996].)[6] This case is the quintessential Exhibit A. Years ago, the City and the Board openly confessed to their constitutional defalcations, yet they have succeeded in evading the constitutionally-mandated remedial consequences of their actions by playing a jurisdictional game. They convinced the state courts to rule in their favor on erroneous procedural — not substantive — grounds, and then convinced the federal courts to preserve that concededly erroneous victory through misapplication of the precept of *res judicata*.[7] It is time to put such shell games to an end, and the only court that can do so is this one. After all is said and done, this situation puts into question the intellectual integrity of the judicial process and, indeed, of this Court's solemn *Williamson County* holding.

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[6] See also Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995): "[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in "ripening" a case], as stalling is often the functional equivalent of winning on the merits"; DeLong, *Property Matters* 296-298 (Free Press 1997): "The name of this game is transaction costs. . . . [¶] Substantive legal doctrines mean little if you cannot get into court in the first place."

[7] One is reminded of Arthur Train's charming stories about a wily New York lawyer named Ephraim Tutt. In one of them, Mr. Tutt displayed his legal acumen by convincing a federal court to dismiss an indictment of his client on the ground that the state courts had jurisdiction of the matter and then, when his client was indicted by state authorities, had the state court dismiss the case on the ground that the federal courts had jurisdiction. (Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book* 413 [Scribners 1945].) The story made for entertaining fiction. However, it makes for a sad commentary on the judicial system when nature imitates such art.

REASONS FOR GRANTING THE WRIT

I

THERE IS CONFLICT AND CONFUSION IN THE LOWER COURTS ABOUT HOW TO RECONCILE THIS COURT'S *WILLIAMSON COUNTY* REQUIREMENT THAT PROPERTY OWNERS "RIPEN" THEIR CONSTITUTIONAL CLAIMS BY SEEKING RELIEF IN STATE COURT BEFORE SUING IN FEDERAL COURT WITH GENERAL PRECEPTS OF *RES JUDICATA* AND COLLATERAL ESTOPPEL

A

This Court's Decision in *Williamson County* Was Clear That Property Owners May Seek Federal Court Redress For Constitutional Violations by Local Government Agencies After Unsuccessfully Seeking Relief in State Court.

One thing that *Williamson County* made clear is that this Court was (a) deciding whether a claim was YET ripe for litigation in federal court and (b) that there were things which first had to be done in state court AFTER WHICH the federal constitutional claims WOULD BE RIPE for federal court.

The Court's analytical section begins with the announced conclusion ". . . that respondent's claim is *premature*." (473 U.S. at 185; emphasis added.) Please note that the word chosen was "premature," not "moribund." Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisdictionally "ripe." The *Williamson County* opinion then goes on to say that, because of the lack of both a final administrative decision and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is *not ripe*." (473 U.S. at 186; emphasis added.) Please note again that the phrase chosen was "not ripe," rather than "dead." Absence of ripeness necessarily means that things need to — and can — be done to make the matter ripe.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of

its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court:

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

Indeed, the plain message of *Williamson County* is that claims that the actions of a local government agency have violated rights protected by the due process and just compensation guarantees of the 5th and 14th Amendments do not even arise until after conclusion of the state court litigation:

> ". . . a property owner has not suffered a violation of the Just Compensation Clause *until* the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. . ." (473 U.S. at 195; emphasis added.)
>
> "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' *until* the State fails to provide adequate compensation for the taking." (473 U.S. at 195; emphasis added.)

". . . even if viewed as a question of due process, respondent's claim is *premature*." (473 U.S. at 199; emphasis added.)

The opinion ends as it began, with this conclusion:

"In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

Thus, *Williamson County* is replete with the twin concepts of "not yet" and "not until." There is no rational way to read *Williamson County* without the realization that the Court anticipated that property owners could satisfy those requirements and render their claim ripe for federal court litigation.

B

Some Lower Courts Have Rigidly and Improperly Applied *Res Judicata* and Collateral Estoppel to Frustrate the Rule of *Williamson County*, While Others Have Recognized This Court's Intent in *Williamson County* and Have Sought Reasonable Ways to Enforce it in Order to Avoid a Wooden Application of Claim and Issue Preclusion Doctrines

In the case at bench, the 6th Circuit held that the state court proceedings were *res judicata*, precluding any federal court litigation, in spite of the uncontested fact that the state courts never considered the merits of any of Rainey Brothers' constitutional claims under either the Tennessee or United States Constitutions. Indeed, because of the state trial court's concededly erroneous application of a Tennessee tort immunity statute,[8] the state courts didn't even consider the merits of non-

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[8] *Felder v. Casey*, 487 U.S. 131, 132, 133 (1988) precludes the interposition of a tort immunity statute between a § 1983 claimant and the courthouse.

constitutional modes of compensating Rainey Brothers for the conceded constitutional violations by the City and the Board.

The 6th Circuit is not without company in its mechanical application of preclusion rules.

Perhaps the most egregious illustration appears in the saga of Mr. and Mrs. Dodd of Oregon. The Dodds purchased 40 acres of land in a secluded area on which they intended to build one home in which to live out their retirement. They were prevented from doing so by the local regulators.[9] Complying with *Williamson County*, they sought redress in state court. In their state court pleadings, Mr. and Mrs. Dodd raised only state law issues, and expressly reserved litigation of their federal claims for federal court. The Oregon courts honored that reservation. (*Dodd I*, 59 F.3d at 857.)

After being denied relief by the state courts (thus fulfilling the *Williamson County* requirement), the Dodds sued in U.S. District Court, where their suit was dismissed based on lack of ripeness. The 9th Circuit reversed. In strong language, it rejected the government's contention that *Williamson County* required the owners to present their 5th Amendment claims to the state courts first, because of the potential impact of *res judicata*:

> "Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result." (*Dodd I*, 59 F.3d at 860-861.)

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[9] This Court may remember the severity of Oregon's regulatory climate from *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Having thus dealt with *res judicata*, or claim preclusion, the court ended on an ominous note by remanding to the District Court for a consideration of collateral estoppel, or issue preclusion, based on the theory that issues had been litigated that could apply to the federal claims as well as the state claims. (*Dodd I*, 59 F.3d at 863.)

Sure enough, on remand, the District Court seized on that statement and found that all the facts had been litigated in state court — as will *always* be the case in a *Williamson County* situation, because there is only a single set of facts by which the local land use regulators either acted arbitrarily toward the land owners or acted in such a way as to take the economically beneficial or productive use of their property — and therefore the matter was barred by collateral estoppel. Having baited the Dodds with its first opinion, the 9th Circuit switched with its second, affirming the dismissal. (*Dodd II*, 136 F.3d 1219.)

Other cases have reached the same Catch-22 result, disregarding *Williamson County's* clear instruction that, once a case had been "ripened" by presenting it to the state courts, it could then be litigated in federal court. (E.g., *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 [10th Cir. 1998]; *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 [9th Cir. 1993]; *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 [3d Cir. 1989].)[10]

Other Circuits have attempted to give meaning to *Williamson County* by concluding that there must be a mechanism by which to modify the normal impact of *res*

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[10] Things have gone so far that a District Court in California, affirmed by the 9th Circuit, has held that there is *no* way for a property owner *ever* to litigate 5th Amendment questions in federal court. It concluded that the upshot of *Williamson County* was that all such litigation must take place in state courts, with recourse to this Court by certiorari being the only possible access to the federal system. (*Hayward Exchange v. City of Oakland*, 1994 U.S. Dist. LEXIS 1421 [N.D. Cal. 1994], *aff'd* 1995 U.S. App. LEXIS 34280 [9th Cir. 1995].)

judicata. The 4th and 11th Circuits, applying a rule developed in a different context by the 5th Circuit, have concluded that property owners can obtain a trial on the merits in federal court if they alert the state court by filing a "reservation" that submits only state law issues while reserving federal issues for a later trial in federal court. (*Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 [11th Cir. 1992]; *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 [4th Cir. 1998]; *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 [5th Cir. 1976].)

Indeed, the 9th Circuit acknowledged the possible utility of such a reservation procedure in *Dodd I*, 59 F.3d at 862, only to take it away in *Dodd II*, 136 F.3d at 1227.[11] The 10th Circuit noted the use made of reservations by the 4th, 5th, and 11th Circuits, as well as the more rigid views of the 3d and 9th Circuits. While disclaiming the need to join one side or the other on the reservation issue, the court expressed this concern about the interface of *Williamson County* and *res judicata*:

> "We do note our concern that *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims. It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 142 F.3d at 1325, fn. 4.)

Whatever the proper resolution of the reservation issue, the fact that several Circuits have adopted such a policy

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[11] In between the two *Dodd* decisions, the 9th Circuit added to the confusion by saying that *Dodd I* "clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation, despite [an] assertion that [a] federal claim will necessarily be precluded by res judicata." (*Macri v. King County*, 126 F.3d 1125, 1130, fn. 7 [9th Cir. 1997].) Without mentioning *Macri*, a different panel reached a contrary conclusion in *Dodd II*, thus rendering the 9th Circuit in conflict with itself on this critical issue.

demonstrates a clear split among the Circuits on how to make *Williamson County* work consistently with the general precepts of claim and issue preclusion. Clarification by this Court is urgently needed.

II

ACADEMICS AND PRACTITIONERS ALIKE AGREE THAT THE INTERFACE BETWEEN *WILLIAMSON COUNTY* AND *RES JUDICATA* IS CONFUSED AND UNJUST

Of all the aspects of regulatory taking law that have been criticized as confusing (and the field has certainly come in for its fair share of such criticism), the ripeness doctrine of *Williamson County* has received the most. And the harshest criticism has been leveled at the requirement that federal claims be "ripened" in state court before presentation to a federal court. A recently-published text calls it "[o]ne of the most confusing aspects of the [*Williamson County*] decision . . . ."[12]

The lower court efforts discussed above have been described as "riddled with obfuscation and inconsistency,"[13] "unclear and inexact,"[14] a "judicially created quagmire" and a "Kafkaesque maze."[15]

The primary target of this criticism is the outright deception of litigants wrought when *Williamson County's* promise

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[12] Laitos, *Law of Property Rights Protection*, § 10.05[A], p. 10-20 (Aspen Publishers 1999).

[13] Testimony of Prof. Daniel R. Mandelker before the House Judiciary Committee, reproduced in full at 31 Urban Lawyer 234, 236 (1999) (hereafter Mandelker testimony).

[14] Meltz, Merriam & Frank, *The Takings Issue* 67 (Island Press 1999).

[15] Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 44, 51 (1992).

of a federal forum is dashed by the application of *res judicata.*[16] That result has been criticized (even by those who think it is appropriate) as "anomalous" and "surprising,"[17] "unpleasant,"[18] and "a trap for the unwary."[19] As Professor Roberts noted:

> "Certainly an anomaly exists: an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It can never be eaten."[20]

Part of the problem has been laid at this Court's doorstep because of its "incomplete exposition,"[21] a conclusion that is certainly apt in this context, as this Court has never explained how *Williamson County* and the rules of claim and issue preclusion relate to each other. However, as one group of academics put it:

> "The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants."[22]

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[16] See Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urban Lawyer 479, 480 (1992) (hereafter Roberts, *Fifth Amendment*): "Reliance on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." Laitos, *supra*, § 10.05[A][5], p. 10-25: "This unfortunate result has produced an outcry from litigants who incorrectly assumed that compliance with [*Williamson County*] would eventually give them their day in federal court."

[17] Roberts, *Ripeness and Forum Selection* at 65.

[18] Roberts, *Fifth Amendment* at 480.

[19] Meltz, Merriam & Frank, *supra* at 67.

[20] Roberts, *Ripeness and Forum Selection* at 68.

[21] Stein, *supra*, 48 Vand. L. Rev. at 4.

[22] Mandelker, Gerard, & Sullivan, *Federal Land Use Law* § 4A.02[6] at p. 4A-21 (Clark, Boardman, Callaghan 1998).

Unfortunately, regardless of this Court's intent, a trap is what the rules have become. As exemplified by this case, once property owners submit their claims to state courts, their risk of never seeing the inside of a federal courthouse (except for purposes of being dismissed therefrom) is high. In testimony before Congress, Professor Mandelker, one of the elder statesmen in this field, testified that his extensive review of the lower federal court decisions showed a "wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation" because "federal judges have distorted the Supreme Court's ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits."[23]

Even specialized scholars and informed attorneys are confused. The present rule — or, more accurately, non-rule — "sometimes catches even the most careful and vigilant."[24] Thus, while one keen observer concludes that "[t]his bar to the federal courts is almost complete,"[25] others optimistically opine that "a litigant with a Federal takings claim is not denied access to Federal court, but simply must pursue available State remedies *before* going to Federal court."[26] This optimism is unwarranted as at least four Circuits take a diametrically opposite view.

This Court's attention to this problem is critical. It exists because *Williamson County* created a unique litigational path for land use disputes raising federal constitutional questions by requiring a detour through the state courts. Surely, the resulting

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[23] Mandelker testimony, 31 Urban Lawyer at 236, 237.

[24] Meltz, Merriam & Frank, *supra*, p. 67.

[25] Roberts, *Fifth Amendment*, 24 Urban Lawyer at 480.

[26] Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urban Lawyer 177, 187 (1999); emphasis added (quoting the Senate Judiciary Committee Minority Report on H.R. 1534).

jurisprudential mess cannot have been intended. Without this Court's guidance, the situation cannot improve; it can only get worse. The lower courts are irreconcilably split, the commentators see nothing but confusion, and innocent litigants are trapped in the middle. When, as at bench, the constitutional violation is conceded by the municipal wrong-doers, the idea of shuffling the victims through a costly litigational maze, at the end of which they are unceremoniously put out on the street, is repugnant to civilized concepts of justice.

III

IF, UNDER *WILLIAMSONCOUNTY*, PROPERTY OWNERS ARE TO BE SINGLED OUT AS THE ONLY CONSTITUTIONAL CLAIMANTS WHO MUST "RIPEN" THEIR FEDERAL CLAIMS IN STATE COURTS, CONCEPTS OF CLAIM AND ISSUE PRECLUSION NEED TO BE APPLIED IN SUCH A WAY THAT *WILLIAMSON COUNTY*'S PROMISE OF AN EVENTUAL FEDERAL HEARING IS PRESERVED

In one of its recent land use cases, this Court expressed its philosophy toward enforcing the protections of the Bill of Rights as follows:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].)

That philosophy requires additional support from this Court to make it real.

A

Property Owners Complaining of 5th and 14th Amendment Violations Are the Only Ones Required to Run a State Court Litigational Gauntlet Before They May Seek Relief From a U.S. District Court

At this time, property owners' 5th Amendment rights *de facto* remain "a poor relation" to others in the Bill of Rights. Although people who are prosecuted in state courts may be required to raise their federal constitutional defenses on pain of losing their ability to litigate them later (e.g., *Allen v. McCurry*, 449 U.S. 90 [1980]), and the same may be true of those who actively seek recompense under the aegis of state law in state courts (e.g., *Migra v. Warren City School Dist. Bd.*, 465 U.S. 75 [1984]), no other federally protected rights have the *Williamson County* precondition to federal litigation.

First Amendment cases abound, for example, in which the validity of local land use ordinances regulating sexually explicit work has been challenged in federal court. (E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 [1986]; *Young v. American Mini Theatres*, 427 U.S. 50 [1976].) There is no requirement of first presenting the issues to state courts, even though the courts are required to apply "contemporary community standards."

Similarly, First Amendment cases dealing with the establishment of religion are litigated in federal courts in the first instance, without any required stopover in state courts, even when they implicate land use issues. (E.g., *Larkin v. Grendel's Den*, 459 U.S. 116 [1982]; *First Assembly of God v. Collier County*, 20 F.3d 419 [11th Cir. 1994].) The same is true of cases focussed on education, where questions of religious involvement are decided by federal courts without any assistance from state courts. (E.g., *Wallace v. Jaffree*, 472 U.S. 38 [1985]; *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 [1985]; *Abingdon School Dist. v. Schemp*, 374 U.S. 203 [1963].)

In *Monroe v. Pape*, 365 U.S. 167 (1961), the federal courts reviewed James Monroe's claim that the Chicago police had violated his 4th Amendment rights, and did so without requiring him first to seek relief in state court. Likewise, as to claims of racial segregation. (*McNeese v. Board of Education*, 373 U.S. 668 [1963].)

Not to belabor the obvious, the cases cited above deal with parallel features of the Bill of Rights, protected in court through 42 U.S.C. § 1983. Just like the rights that Rainey Brothers sought to protect here. The difference is that the plaintiffs in the other cases were able to proceed directly to U.S. District Court to seek redress for alleged violations of their federally protected rights. But not Rainey Brothers. Unlike all the rest, Rainey Brothers (and all other property owners seeking the same kind of protection) was required to go first to state court in order to "ripen" its federal claim.[27]

If, as this Court said in *Dolan*, rights protected by the property clauses of the 5th and 14th Amendments are not to be "relegated to the status of a poor relation," then one of two things needs to happen: either *Williamson County* needs to be reconsidered, or the concepts of claim and issue preclusion need to be reconciled with it in a manner that preserves the state court "ripening" process while also preserving the aggrieved citizens' rights, as well as federal court jurisdiction to determine the validity of their constitutional claims. By forcing property owners to proceed through a hopeless morass of state court procedures — which ensure, through *res judicata*, that they will never see the inside of a federal courthouse — the "poor relation"

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[27] Kassouni, *supra*, 29 Cal. West. L. Rev. at 2: "The net result is a special ripeness doctrine applicable only to constitutional property rights claims." See also Delaney & Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urban Lawyer 195, 198 (1999); Stein, *supra*, 48 Vand. L. Rev. at 13-14; Fischel, *Regulatory Takings* 55 (Harvard U. Press 1995).

status of their constitutional protection is guaranteed.[28]

B

Because of the Importance This Court Has Always Placed on the Ability of Constitutional Plaintiffs to Have Access to Federal Courts, a Mechanical Application of Ordinary Precepts of Claim and Issue Preclusion Should Not be Used to Bar the Courthouse Doors After Property Owners Comply With the "Ripeness" Requirements of *Williamson County*, Because That Makes This Court's Holding Self-Stultifying

Both before and after *Williamson County*, this Court's cases have been uniform that suits seeking redress under 42 U.S.C. § 1983 belong in federal court, regardless of the possibility of obtaining relief in state court, because federal courts are uniquely suited and intended to adjudicate federal issues.

Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 [1972]) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 [1972] [quoting with approval]) so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]). While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader " (*Kalina v. Fletcher*, 522 U.S. 118, 123 [1997]), and must be broadly and liberally construed to achieve its goals (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 [1989]; *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 [1979]). "[T]he central purpose of the Reconstruction-Era laws is to

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[28] This is no advocate's hyperbole. Here, Rainey Brothers was forced through a state court system which repeatedly erred in denying relief (as belatedly conceded by the defendants in their 6th Circuit brief [pp. 12, 22, 30]) and then the District Court set those errors in constitutional concrete by declaring them *res judicata* in this section 1983 suit because procedural errors, he said, were *on the merits*.

provide compensatory relief to those deprived of their federal rights by state actors" (*Felder v. Casey*, 487 U.S. 131, 141 [1988]) by "***interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights***" (*Mitchum*, 407 U.S. at 243; emphasis added).[29]

On several occasions, this Court has examined the background of section 1983. In its seminal decision in *Monroe*, for example, after an exhaustive discussion, the Court concluded:

> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford *a federal right in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (*Monroe*, 365 U.S. at 180; emphasis added.)
>
> "It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.*" (*Monroe*, 365 U.S. at 183; emphasis added.)

The same theme appears in *McNeese v. Board of Education*, 373 U.S. 668, 671-672 (1963).

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[29] It cannot be overemphasized that the rulings below crudely obvert this rule and, in fact, interpose state, not federal, courts between the Constitution and the citizens seeking its enforcement. With all due respect, this gives rise to a *sub rosa* resuscitation of the "interposition doctrine" that raised its head briefly in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), only to be interred in *Cooper v. Aaron*, 358 U.S. 1 (1958).

In *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982), this Court again examined the Congressional debates preceding the adoption of section 1983, and concluded that Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts* . . . ." (Emphasis added.)

If, as this Court has repeatedly held, Congress intended for section 1983 plaintiffs to have their cases tried in federal courts if they so opted, then some accommodation of the general standards for claim and issue preclusion seems mandated. Otherwise, the law — at least as seen by the courts below — would create a class of constitutional pariahs who may never litigate their federal constitutional claims in federal court. *Williamson County* segregates this one type of section 1983 litigation and, instead of providing "immediate access to the federal courts," requires a "ripening" procedure that, as construed below, absolutely precludes access to the federal courts. As Professor Laitos put it recently:

> "The combined effect of [*Williamson County*], res judicata, collateral estoppel, and the full faith and credit statute is to make a takings claim moot, and precluded, if a property owner takes all the necessary steps to make the claim ripe." (Laitos, *supra*, § 10.05[A][5], p. 10-25.)

That cannot have been the intent of a Congress that sought to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." (*Mitchum*, 407 U.S. at 243.)

If state court litigation legally precludes section 1983 plaintiffs from being heard in federal court, then constitutional plaintiffs are at the mercy of state courts in molding their federal claims. But this Court's jurisprudence forbids that sort of power to the states. After all, this litigation is all about *federal* rights.

As noted earlier, one of the purposes of section 1983 was to provide a federal remedy where the state remedy, "by reason of prejudice, passion, *neglect*, intolerance *or otherwise*" (*Monroe*, 365 U.S. at 180; emphasis added) was not enforced. That is this case in spades.[30]

Nonetheless, the courts below felt compelled to honor the concededly deficient Tennessee decisions because, in Tennessee, procedural motions to dismiss are treated as being on the merits. This eliminated any chance of Rainey Brothers' claim ever being considered on its actual merits. That violates this Court's repeated admonition that state courts cannot be granted the power to define federal claims:

> "'Congress,' we have previously noted, 'surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.'" (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting with approval from *Wilson v. Garcia*, 471 U.S. 261 [1985].)

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[30] The infirmity of the state court judgment militates against giving it any preclusive effect. Where the party against whom the judgment was entered did not have a "full and fair opportunity" to litigate the facts or where, for some other reason, there is reason to doubt the quality, extensiveness, or fairness of the procedures followed, then "full faith and credit" is not warranted. (*Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480 [1982]; *Allen v. McCurry*, 449 U.S. 90, 95 [1980]; *Montana v. United States*, 440 U.S. 147, 153 [1979].) Here, not only did the District Court find that the state courts "were simply wrong" in their conclusions (App. B, p. 18), the City and the Board conceded the same thing in their 6th Circuit brief (pp. 12, 22, 30), thereby conceding their own complicity in convincing the state courts to wrongly insulate them from liability. The "process" that Rainey Brothers received in the Tennessee courts was anything but "due process." Respectfully, it wasn't even a good caricature of due process. It cannot bar this litigation and yet be consistent with a principled adjudication process.

It is one thing for this Court to invoke a rule of prudential ripeness (see *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 733-734 [1997]), and ask state courts to determine the extent of the remedies they offer under the circumstances. It is something quite different to overlay doctrines of claim and issue preclusion on the state courts' answers, and thereby enable states to prevent access to federal courts contrary to *Williamson County*, where this Court repeatedly noted how the case was simply "not yet" ripe for federal determination. By granting preclusive effect to either the entire claim presented to the state court or to discrete issues litigated there, the interpretation of *Williamson County* by the 3d, 6th, 9th, and 10th Circuits presented here for review flies in the face of settled section 1983 jurisprudence.[31]

This Court has had extensive experience with the relationship between state and federal courts in a different, yet analogous, field: federal habeas corpus petitions. Habeas petitioners are required to present their federal constitutional issues to the state courts before seeking federal court relief, on the ground that state courts ought to be given the opportunity to correct their own constitutional violations before they are brought before a federal court. (*Picard v. Connor*, 404 U.S. 270, 275 [1971].) The requirement to repair first to the state courts (and to present there all of the federal constitutional issues that will eventually be raised in U.S. District Court) is not jurisdictional (*Castille v. Peoples*, 489 U.S. 345, 349 [1989]), but it is nonetheless required (*O'Sullivan v. Boerckel*, 119 S.Ct. 1728 [1999]).

But, having presented all of the federal constitutional issues to the state court for adjudication, and having received an unfavorable response, is the habeas corpus petitioner subjected to

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[31] The availability of a petition for certiorari to this Court after conclusion of the state court proceedings is, as this Court has said, "an inadequate substitute" for trial in a U.S. District Court, because "[h]ow the facts are found will often dictate the decision of federal claims." (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416 [1964].)

res judicata and full faith and credit arguments upon arriving in federal Court? Of course not. This Court put it as plainly as could be in *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977): "It is *not* res judicata." (Emphasis added.) If being required to submit *federal* constitutional issues to a state court for review does not preclude later federal examination of those *same* issues, then *a fortiori*, the forced submission of *state* constitutional issues to a state court should not, indeed cannot, logically preclude later adjudication of *federal* constitutional issues by a federal court in this 5th and 14th Amendment context.

There is no intellectually defensible reason why property owners in section 1983 cases, and they alone, should be confronted with the bar of *res judicata* when they seek to enter the federal courthouse doors that were supposedly "thrown open" to them by section 1983 (*Patsy*, 457 U.S. at 504) so that they could litigate their federal claims in a federal forum.

With respect, the confusion now reigning below on how to apply *Williamson County*, and particularly how to reconcile it with general doctrines of preclusion cries out for this Court's intervention. Decisions like the one below, concluding that the only thing such a case is "ripe" for is dismissal, cannot have been the intent of *Williamson County's* ripeness doctrine. As a group of respected law professors put it, this "Court could hardly have intended the ripeness rules to become a trap for federal litigants." (Mandelker, Girard & Sullivan, *supra*, § 4A.02[5][e], p. 4A-21.) But a trap they have nonetheless become. Examination of *Williamson County's* interaction with rules of claim and issue preclusion is badly needed.

CONCLUSION

> "The ripeness rules developed by the courts have caused hardship to property owners who seek court access so their constitutional claims can be heard. *Williamson County* and its progeny should no longer be misused to block takings cases where concrete and ascertainable injuries flow from final land use decisions."
> (Mandelker testimony, 31 Urban Lawyer at 253.)

In the fourteen years since this Court decided *Williamson County*, the lower courts have created a procedural and jurisdictional mare's nest that serves only to place traps in the way of property owners who are trying to follow the rules and "ripen" their constitutional claims for federal court litigation as prescribed by this Court. The case at bench perfectly illustrates the problem because *confessed constitutional wrong-doers* have managed to manipulate the state and federal judiciaries into denying relief in both systems. Whatever one wants to call that, it is not due process, nor even rudimentary justice. It is a triumph of conceded wrong-doing over constitutional guarantees, and this Court should have no part of it.

Instead of creating workable rules for litigating regulatory taking cases, including rules for "ripening" them through state court litigation, the current system has produced only chaos. The chaos is highlighted by the fact that the 3d, 6th, 9th, and 10th Circuits adhere strictly to the belief that the state court "ripening" process causes perfectly valid federal claims to become barred at the very moment they become ripe for federal litigation, while the 4th, 5th, and 11th Circuits have devised reasonable ways to provide a federal forum in which to litigate the ripened cause of action. Both approaches cannot be right. Citizens' constitutional rights should not vary with their residence. In a principled jurisprudence, geography should not be destiny.

Rainey Brothers prays that Certiorari be granted, that this Court resolve the rampant conflict of decisions, that it clarify the

widely misunderstood effects of its *Williamson County* holding, and that it civilize the law so that these conceded constitutional injuries may finally be adjudicated on the merits. As constitutional liability has already been conceded, the trial on remand would relate solely to compensation.

Respectfully submitted,

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and

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**Counsel of Record*

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NOT RECOMMENDED FOR PUBLICATION
No. 97-5897
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Rainey Brothers Construction Company, Inc. *Plaintiff-Appellant,*	)	**On Appeal From The United States District Court For The Western District of Tennessee**
v.	)	
Memphis and Shelby County Board of Adjustment; and City of Memphis, Tennessee *Defendants-Appellees.*	)	

6th Circuit Court of Appeals Filed 4/5/99 Leonard Green, Clerk

Before: **SILER, BATCHELDER, and COLE,** Circuit Judges.

PER CURIAM. Plaintiff Rainey Brothers Construction Company, Inc. ("Rainey") appeals the district court's grant of summary judgment in favor of the defendants, Memphis and Shelby County Board of Adjustment (the "Board") and the City of Memphis. Rainey brought a § 1983 action against the defendants, asserting substantive and procedural due process claims and inverse condemnation and takings claims in connection with the Board's revocation of a zoning variance. The district court held that a prior state court judgment had preclusive res judicata effect. As set forth below, we AFFIRM the judgment of the district court.

Not recommended for Full-Text Publication - Sixth Circuit Rule 206 limits citation to specific situations. Please see Rule 206 before citing in a proceeding in a court in the Six Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BACKGROUND [1]

In 1976, Rainey simultaneously brought two actions, one seeking an injunction and another seeking money damages, in a Tennessee state court against the defendants, alleging that the Board had acted arbitrarily and capriciously when it revoked construction permits previously issued to Rainey. For the next twelve years, neither side took any action.

Then, in 1988, Rainey filed amended complaints and later filed second amended complaints in both actions. The amended complaints added specific claims for inverse condemnation under Tennessee state law, a takings claim under the federal constitution, and substantive and procedural due process claims under the state and federal constitutions. The defendants filed a motion to dismiss the second amended complaints on the grounds that they contained new causes of action that did not relate back to the date of the original complaint. The trial court dismissed the second amended complaint in each action pursuant to TENN. R. CIV. P. 12.02(6), holding that the claims did not relate back under TENN. R. CIV. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. Rainey filed an interlocutory appeal.

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[1] The facts of this case are stated in the district court's opinion, *Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F.Supp. 998 (W.D. Tenn. 1997). However, a brief summary of the relevant facts is provided herein.

The Tennessee Court of Appeals affirmed the dismissals, finding that the second amended complaints raised several new claims that did not relate back to the date of the original pleading:

> Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 942 (Tenn. Ct. App. 1991). Rainey was denied permission to appeal to the Tennessee Supreme Court and by the United States Supreme Court.

In 1994, a non jury trial began on Rainey's original claims. The trial court found that the defendants had violated Rainey's constitutional rights and that the Board's decision revoking the construction permits was capricious, arbitrary and illegal. However, the court determined that Rainey's claim for money damages was barred by the Tennessee Governmental Tort Immunity Act. *See* TENN. CODE ANN. § 29-20-205. The Tennessee Court of Appeals dismissed Rainey's appeal on the grounds that Rainey had failed to timely file a transcript in accordance with Tenn. R. App. P. 24(b). The Tennessee Supreme Court denied permission to appeal.

In 1996, Rainey filed this action in federal court under 42 U.S.C. § 1983, asserting the same claims which had been dismissed by the Tennessee courts. The district court granted summary judgment in favor of defendants, holding that the state court judgment had preclusive res judicata effect, even though the state courts erroneously applied the law.

DISCUSSION

Rainey argues that it was a victim of the *"Williamson* Trap." It claims that, in the course of ripening its claims in state court, as it was required to do under *Williamson Cty. Reg'l Planning Comm 'n. v. Hamilton Bank*, 473 U.S. 172 (1985), it was unconstitutionally deprived of federal remedies by erroneous state court holdings which were subsequently given res judicata effect by the district court. Rainey argues that the Tennessee state courts purposefully prevented it from presenting the merits of its claims and denied it a "full and fair opportunity" to litigate its federal and state constitutional claims by applying procedural rules in an "unequal, shallow and fundamentally unfair manner."

Rainey's arguments are without merit. In *Dyer v. Intera Corp.*, 870 F.2d 1063, 1066-1067 (6th Cir. 1989), we held that a Tennessee court's dismissal of a state action pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief could be granted was a decision on the merits which had preclusive effect in a federal court action raising the same claims. Here, the Tennessee state court dismissed Rainey's claims under Rule 12.02(6) because its additional claims did not relate back as required by Rule 15.03. Relying on *Dyer*, the district court held that the state court decision was indeed a decision on the merits

and entitled to preclusive res judicata effect. Rainey attempts to distinguish *Dyer* by making a subtle distinction between the procedural background of *Dyer* and the procedural background in this case. Although the claims in *Dyer* and the claims in the present case were dismissed under Rule 12.02(6), Rainey argues that whereas the state court decision in *Dyer* was a decision "on the merits" because the state court addressed the substance of the claims, the state court decision in the present case was not "on the merits" because the courts never analyzed the substance of its claims. Rainey does not cite any case law to support such a distinction. Moreover, the district court's conclusion that the state court decision was on the merits is supported by the language of Civil Rule 41.02(3), which states:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for lack of an indispensable party, operates as an adjudication upon the merits. (Emphasis added.)

Dyer, 870 F.2d at 1066 (relying on the language of Rule 41.02(3) to support its conclusion that a Rule 12.02(6) dismissal was a decision on the merits). Hence, the district court did not err in concluding that the state court's Rule 12.02(b) dismissal was a decision on the merits.

Additionally, Rainey claims that res judicata should not apply because it did not have a "full and fair opportunity" to litigate its constitutional claims. *See Kremer v. Chemical Constr.*

Corp., 456 U.S. 461 (1982). Rainey claims it did not have such an opportunity due to the Tennessee courts' erroneous application of the relation-back doctrine. While the district court agreed that the state courts had erroneously applied the relation-back doctrine, it recognized that a state court's misapplication of its own law was not a legitimate basis for avoiding the application of res judicata principles. Rainey places a great deal of emphasis on *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979), and also on *Kremer*, 456 U.S. at 481, in which the Court stated that "[r]edetermination of issues is warranted if there is a reason to doubt the quality, extensiveness, or fairness of the procedures followed in prior litigation." However, Rainey misconstrues the statement from *Montana and Kremer*. The Supreme Court did not intend for parties to be able to bring a § 1983 action re-asserting the same claims every time there was evidence that a state court misapplied its own law in a prior adjudication. Rather, the Court defined the content of the "full and fair opportunity" requirement by stating that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Thus, as long as a state's procedures were constitutionally sufficient, the fact that a state court may have erroneously applied its own law does not mean that it denied a plaintiff's full and fair opportunity to litigate its claims. As stated by the district court:

> [T]his is not a case where the state had employed a procedural rule to thwart federal rights in a systemic fashion. Indeed, as plaintiff argues, the state courts were

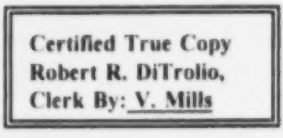
> simply wrong in their holding that plaintiff could not amend its pleadings to assert its federal claims. That the state courts were wrong, however, does not empower this Court to review such a decision. To hold otherwise would require federal district courts to review all state court decisions that dismissed any federal claims on a procedural ground. For obvious reasons, the Court declines to transform the federal district courts into state appellate courts.

Rainey Bros. Constr. Co. v. Memphis and Shelby County Bd. of Adjustment, 967 F.Supp. 998, 1005-06 (W.D. Tenn. 1997) (citations omitted). We agree.

Affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Rainey Brothers Construction Company, Inc. *Plaintiff-Appellant,*	)	
v.	)	
	)	**Case No. 96-3156**
Memphis and Shelby County Board of Adjustment; and City of Memphis, Tennessee *Defendants-Appellees.*	)	**M1-V**



ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This matter is before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment, filed November 25, 1996. Because the defendants have submitted and the Court has considered matters outside of the pleadings, the Court will treat defendants' motion as a motion for summary judgment.[1]

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[1] In its memorandum in opposition to defendants' motion, plaintiff argues, inter alia, that Exhibits A through O attached to defendants' motion may not be considered by this Court in resolving defendants' motion because such materials are--outside the scope of materials allowed under Fed. R. Civ. P. 56 and Local Rule 11(d)(2). Rule 56(a) provides that only affidavits,

See Fed. R. Civ. P. 12(b). For the reasons set forth below, defendant's motion is GRANTED.

BACKGROUND

This case is the culmination of a long standing land dispute between plaintiff, Rainey Brothers Construction Company, Inc., and defendants, the Memphis and Shelby County Board of Adjustment (the "Board") and the City of Memphis (the "City"). The property in question is a fourteen (14) acre tract of land located at the intersection of Helene and Vera Cruz streets, known as 5261 Helene, in Memphis, Shelby County, Tennessee. The property is bounded on the south by Interstate I-240, on the north by Helene Avenue and the East Memphis Catholic Club, on the west by an open concrete lined ditch, and on the east by residences that face away from the property.

On February 3, 1964, plaintiff presented a preliminary plan to develop single-family houses on the property to City officials but was told that the minimum building elevation had been increased. Because raising the minimum building elevation

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pleadings, depositions, or answers to interrogatories may be considered and relied upon by a court in considering a motion for summary judgment. Fed. R. Civ. P. 56(a). According to plaintiff, "even if [defendants' exhibits] were past orders and pleadings, they are not verified and are not self-authenticating." This issue was raised by the Court at a hearing held on January 21, 1997, at which plaintiff stipulated to the authenticity of the documents. Accordingly, this issue is now moot.

made it economically unfeasible to build single-family houses on the property, plaintiff then sought R-4 apartment zoning in order to construct 432 units of two (2) story apartments on the property. This request was rejected by the City's Planning Commission, and, on appeal, this decision was upheld by the City Commission.

Subsequently, the City Commission approved the property for R3A zoning, effective December 29, 1967, which would have allowed plaintiff to build 244 apartments on the property. Relying on this zoning change, plaintiff applied to the City Building Department for a building permit. The City's mayor, however, instructed the City's Building Department not to issue a building permit for the construction of the 244 apartments on the property. Consequently, on January 16, 1968, the City's Building Official notified plaintiff that the City would not issue a building permit to construct apartments on the property.

In response, plaintiff then requested that the Board grant it permission to construct 165 apartments on the property. The Board approved this request but required that the apartments be constructed at an elevation of 274.9 means sea level ("msl"). Once again, the Mayor expressed his opposition to the construction of the apartments, requesting that the Board reconsider its approval. This time, however, the Board reaffirmed its approval of the construction.

Then, relying on a decision of the Tennessee Supreme Court, Glankler v. City of Memphis, 481 S.W.2d 376, 378 (Tenn. 1972) ("The Board of Adjustment of the City of Memphis is an administrative body which enjoys a wide latitude and great discretion in the granting of variances from the zoning regulations when it finds that such regulations impose unnecessary restraint or hardship. It is not an unlawful delegation of authority to confer on such a board jurisdiction to hear and determine appeals.") Plaintiff requested that the Board grant a hardship variance to lower the minimum fill elevation from 274.9 msl to 270 msl. On August 29, 1975, the Board, acting in executive session, granted plaintiff's requests for a hardship variance and lowered the minimum fill elevation on the property from 274.9 msl to 270 msl; the Board, however, did not hold a public hearing or give notice to interested parties of plaintiff's request for a variance.

After obtaining the variance, plaintiff waited over sixty (60) days to see if any appeal or action challenging the variance would be filed, as provided in the City's Charter and applicable state statute. Because no appeal or other challenge was filed within the 60 day period, plaintiff began obtaining all necessary permits and contracting with various engineers, materialmen, suppliers, and plumbers in furtherance of construction. Plaintiff also obtained approvals from the City's Plumbing Department and revised its sewer plans. Inspections of the property were made by the City's Building Department. Slabs where then placed in position after receiving approval and financing. Construction was well into the framing stage by April 1976.

On April 7, 1976, some seven (7) months after the Board's August 29, 1975 action, an attorney representing certain objectors sent notice to the Board, complaining about the action. Subsequently, on April 28, 1976, the Board rescinded the August 29, 1975 action, revoked the variance, and reinstated the original building elevation of 274.9 msl. All of this action was taken without any notice to plaintiff and without giving plaintiff any opportunity to appear or to be heard. According to plaintiff, the change in the minimum building elevation required that it tear down the construction already completed, fill the property to the minimum building elevation of 274.9 msl, and rebuild at significant expense. Plaintiff, however, did not take these steps.

Instead, plaintiff petitioned for a rehearing at the next meeting of the Board, scheduled for May 26, 1976. This request, however, was denied. Subsequently, on September 30, 1976, without any notice or any opportunity to be heard, the City's Building official canceled and revoked plaintiff's construction and other permits. Plaintiff contends that this constituted a final decision by the Board and the City.

On May 27, 1976, plaintiff simultaneously filed two (2) actions in state court. The first action, Case No. 53654 R.D.-8

("Rainey I"), sought review of the Board's April 28, 1976 action via certiorari, in which plaintiff sought an injunction superseding the action of the Board and preventing the City's Building Department from enforcing the Board's decision. Plaintiff also prayed for "such other, further and general relief to which it may be entitled in the premises and as the proof may

show to be necessary and the circumstances require." In essence, plaintiff argued that it had taken numerous steps, expended significant sums, and executed notes in reliance on the Board's August 27, 1975 action lowering the building elevation to 270 msl and that the Board's April 28, 1976 decision was illegal, ultra vires, without jurisdiction, arbitrary and capricious (and therefore a deprivation of substantive due process), and had caused Rainey Brothers great financial and economic harm.

The second action, Case No. 73473.-8 T.D. ("Rainey II"), sought money damages resulting from the Board's April 28, 1976 decision. As in Rainey I, plaintiff asserted that it had relied on the Board's decision to lower the building elevation to 270 msl and, as a result, had expended significant sums and had executed various notes. Moreover, plaintiff alleged that as a result of that decision, it was required to tear down the construction already completed, to fill the property to 274.9 msl, and rebuild at significant expense.

Incredibly, during the next 12 years, there was apparently no action taken in the cases. According to plaintiff, none of the defendants filed any responsive pleading or answer to either complaint during this time. At the same time, plaintiff never moved for entry of default or a default judgment. Finally, on November 14, 1988, plaintiff filed an amended complaint in each action. The amended complaints added specific claims for inverse condemnation under Tennessee state law, Tenn. Code Ann. § 29-16-123, a takings claim under the federal constitution, and substantive and procedural due process claims under the state and federal constitutions. In addition, the amount of damages

sought was increased significantly. Subsequently, plaintiff sought leave to file a second amended complaint in each action. Leave to file was granted by the trial court, and, on March 8, 1989, plaintiff filed second amended complaints in each action.

On March 21, 1989, defendants moved to dismiss the second amended complaints on the grounds that the amended complaints contained new causes of action that were barred by the applicable Tennessee statutes of limitations because they did not relate back to the date of the original complaint. On August 2, 1989, the trial court dismissed the second amended complaint in each action pursuant to Tenn. R. Civ. P. 12.02(6), holding that these claims did not relate back under Tenn. R. Civ. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. The trial court, however, did grant plaintiff's motion for leave to file an interlocutory appeal from each order of dismissal.

On interlocutory appeal, the Tennessee Court of Appeals affirmed the dismissals, finding that the second amended complaints raised several new claims and did not relate back to the date of the original pleading:

> Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 942 (Tenn. Ct. App. 1991). Plaintiff's request for permission to appeal to the Tennessee Supreme Court was denied. Plaintiff's petition for a writ of certiorari to the United States Supreme Court was also denied.

On April 25, 1994, a non-jury trial began in the Circuit Court of Shelby County, Tennessee. On the first day of the trial, the City Attorney, representing the City and the Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally when it restored the 274.9 msl building elevation without any notice to plaintiff and without providing any opportunity for plaintiff to be heard or object. In essence, defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions.

On May 17, 1994, the trial court entered an order, holding that the City and the Board had violated plaintiff's constitutional rights, and, therefore, the April 28, 1976 decision of the Board was "void, capricious, arbitrary and illegal and therefore reversed." Despite this finding, the trial court found that plaintiff's money damage claim in Rainey II was "barred by the general immunity afforded to a municipality and specifically, by the language in Tenn. Code Ann. § 29-20-205."

On May 27, 1994, plaintiff filed a notice of appeal, in which it sought review of the dismissal of its damage claim. On April 7, 1995, because plaintiff had not filed a transcript in

accordance with Tenn. R. App. P. 24(b),[2] the Tennessee Court of Appeals filed an order to show cause why the appeal should not be dismissed for failure to comply with the Tennessee Rules of Appellate Procedure. On April 18, 1995, the Tennessee Court of Appeals dismissed the appeal, finding that plaintiff had not shown good cause for its failure to file the transcript. See H. D. Edgemon Contracting Co. v. King, 803 S.W.2d 220, 223 (Tenn. 1991) (holding that "the 90-day requirement set forth in Rule 24 is reasonable and fair and in the absence of "good cause" being shown, the rule must be enforced").

On September 11, 1995, the Tennessee Supreme Court denied plaintiff's application for permission to appeal. Plaintiff then moved for reconsideration, and, on November 6, 1995, the Tennessee Supreme Court denied that motion as well. On November 5, 1996, plaintiff filed an action under 42 U.S.C. § 1983 in this Court, seeking to assert a substantive due process claim, a procedural due process claim, and an inverse condemnation or takings claim. On November 25, 1996, defendants responded to the complaint by filing a motion to dismiss or, in the alternative, for summary judgment on the grounds that plaintiff's claims were barred by the doctrine of res judicata. On December 27, 1996, plaintiff filed a response, and on February 4, 1997, the Court heard argument on defendant's motion.

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[2]Rule 24(b) provided that "the transcript . . . shall be filed with the clerk of the trial court within 90 days after filing the notice of appeal." Tenn. R. App. P. 24(b).

STANDARD OF REVIEW

Under Rule 56 (c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Pursuant to Rule 56 (e), when confronted with a properly supported motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but his" response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. In considering a motion for summary judgment, however, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion."Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

DISCUSSION

Defendants move for summary judgment on the grounds that the claims raised by plaintiff in its complaint have been previously decided against them in state court and are, therefore, res judicata between the parties. Under the Full Faith and Credit

Act, 28 U.S.C. § 1738, "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523 (1986); accord Migra v. Warren city Sch. Dist. Bd., 465 U.S. 75, 83-84 (1984) (holding that, even in an action brought under § 1983, a federal court must give preclusive effect to issues that were actually litigated or could have been litigated in a prior state court proceeding). A federal court can refuse to accord preclusive effect to a state court judgment, however, if application of the state preclusion law would violate due process. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."). Due process is violated if a litigate did not have a full and fair opportunity to litigate his claims. Id. at 480-81.

Under Tennessee law, a previous action is given preclusive res judicata effect if: (1) the underlying judgment was rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; and (4) the underlying judgment was on the merits. Lee v. Hall, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990); Hutcheson v. Tennessee Valley Auth. 604 F. Supp. 543, 550 (M.D. Tenn. 1985); 22 Tenn. Juris. Res Judicata §§ 8-11 (1985). Applying these standards to the instant case, there is no real dispute that the traditional elements of res judicata have been established.

Specifically, it is beyond dispute that the Tennessee state courts have jurisdiction to hear federal statutory and constitutional claims. Nor is there any dispute that the same parties involved in this case were also parties to the state court action. Likewise, there is no question that plaintiff seeks to assert in this case the exact claims that were previously raised and dismissed by the state courts pursuant to Tenn. R. Civ. P. 12.02(6). Finally, it is well settled that an order of dismissal granted pursuant to Tenn. R. Civ. P. 12.02(6) is a decision on the merits of the case. Dyer v. Intera Corp., 870 F.2d 1063, 1066 (6th Cir. 1989) ("Tennessee Rule of Civil Procedure 12.02(6) is based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. . . . In the federal courts, a dismissal pursuant to Rule 12(b)(6) is considered a decision on the merits with full res judicata effect.") (citations omitted). Accordingly, defendants are presumptively entitled to dismissal of this action on res judicata grounds.

A.

Plaintiff, however, seeks to avoid the application of res judicata on essentially three grounds. First, plaintiff argues, citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), that res judicata is inapplicable because its federal claims were not ripe until the state courts ruled on its claims. In Williamson County, the Supreme Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Federal] Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195. This rule rests; on the fact that the United States Constitution does not

prohibit takings per se, only takings without just compensation.[3]

Although plaintiff correctly states the principle of Williamson County, plaintiff improperly concludes that res judicata is inapplicable in such cases. On the contrary, as the Supreme Court has noted,

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in

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[3]In Bigelow v. Michigan Department of Natural Resources, 970 F.2d 154, 159-60 (6th Cir. 1992), the Sixth Circuit extended this ripeness doctrine to include procedural due process claims that arise from and are ancillary to the alleged taking. See Hoehne v. San Benito County, 870 F.2d 529, 532 (9th Cir. 1989) (stating that "the final decision requirement is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations, and is most likely applicable to related due process claims"); Harris v. Riverside County, 904 F.2d 497, 500 (9th Cir. 1990) (stating that "[p]rocedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case"). The court reasoned that "addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by attaching a procedural due process claim to their complaint." Bigelow, 970 F.2d at 160.

> a state court proceeding in which he would rather not have engaged at all.

Allen v. McCurry, 449 U.S. 90, 104 (1980). Indeed, at least two Courts of Appeals have rejected plaintiff's exact argument and have found that the interaction between Williamson County and the Full Faith and Credit Act requires that a plaintiff landowner assert his federal claims in the state courts. For example, in Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989), the Third Circuit held: –

> Appellants have exhausted their state claims, which, under Williamson, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitle" them to no more.

Id. at 729; accord Palomar Mobile Home Park v. City of San Marcos, 989 F.2d 362, 364-65 (9th Cir. 1993) (citing Peduto).[4]

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[4]The Court does note, however, that the Ninth Circuit has partially retreated from its holding in Palomar. In Dodd v. Hood River County, 59 F. 3d 852 (9th Cir. 1995), the Ninth Circuit held: "We disagree ... with the suggestion that Williamson County is a thinly-veiled attempt by the [Supreme] Court to eliminate the federal forum for Fifth Amendment taking plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedures in the state." Id. at 861. The court,

This Court agrees with the reasoning of Peduto and Palomar and, therefore, finds plaintiff's argument unpersuasive.[5]

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however, did not overrule the res judicata principles set forth in Palomar. In particular, the Court notes that the Dodd court did not hold, as plaintiff suggests, that res judicata does not apply in cases where a plaintiff is required by Williamson County to litigate its claims in state court. Instead, it merely held that res judicata did not apply under the facts of that case, finding that the state and county had tacitly consented to the splitting of the claims and that the Oregon court had expressly reserved the federal constitutional issue for a later determination and, therefore, had not been fully adjudicated. Dodd, 59 F.3d at 862.

After review Dodd and the facts of this case, this Court finds that it is not confronted with the same factual circumstances. Specifically, there was no agreement between the parties that plaintiff could split its claims and there was no express reservation by the Tennessee courts of plaintiff's claims for a later determination. Instead, the Tennessee courts specifically addressed plaintiff's claims but found that they did not relate back under Tenn. R. Civ. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. Accordingly, the court dismissed those claims under Tenn. R. Civ. P. 12.02(6). In light of these differences, the Court finds that it need not address the issues raised in Dodd.

[5]In Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit held that a plaintiff landowner can preserve his federal constitutional claims for federal court by making a reservation of rights in the state court proceeding. See Jennings v. Caddo Parish Sch. Bd., 531 F.2d

B.

Alternatively, plaintiff argues that res judicata is inapplicable because plaintiff did not have a full and fair opportunity to litigate its federal claims in state court. Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss at 7 (citing Kremer, 456 U.S. at 481). According to plaintiff, the state courts' refusal to hear its federal claims on the grounds that plaintiff was precluded from amending its pleadings under Tenn. R. Civ. P. 15.03 deprived it of a hearing on the merits of its federal claims and, therefore, violated due process. In making this argument, plaintiff relies, in part, on the Eleventh Circuit's opinion in Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991), overruled on other grounds by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc). Plaintiff's reliance on Sewell, however, is misplaced. In Sewell, the plaintiff sought back pay and reinstatement when he filed a writ of mandamus in state court. In a subsequent federal action, the defendants argued that the matter was res judicata between the parties because the plaintiff had sought back pay and restitution in his mandamus action. The Eleventh Circuit, however, held that the plaintiff's federal claims were not barred by res judicata because the plaintiff had failed to receive a "legitimate opportunity to litigate

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1331, 1332 (5th Cir. 1976) (holding that a party can reserve her constitutional claims for subsequent litigation in federal court" by "making on the state record a reservation as to the disposition of the entire case by the state courts"). Because plaintiff made no such reservation of rights in this case, however, the Court expressly declines to decide whether such a reservation would be effective in similar cases.

his section 1983 claims in state court." Sewell, 946 F.2d at 762. Specifically, the court held that there is no res judicata effect when the state court completely ignores federal claims raised in state court. Id.

Unlike the state court in Sewell, however, the Tennessee courts did not completely ignore the federal claims raised by plaintiff. Instead, as noted above, the state courts considered plaintiff's proposed federal claims but dismissed them pursuant to Tenn. R. Civ. P. 12.02(6) on the grounds that they did not relate back under Tenn. R. Civ. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. As further noted above, a dismissal pursuant to Tenn. R. Civ. P. 12.02(6) is a decision on the merits for res judicata purposes. Dyer, 870 F.2d at 1066. Thus, plaintiff's reliance on Sewell is misplaced.

In essence, the crux of plaintiff's argument is that it was denied due process because the decision of the Tennessee courts to dismiss its federal claims was erroneous. In reality, therefore, plaintiff seeks to have this Court review the validity of the state court's decision. The Court, however, declines this invitation on a number of grounds.

First, it is well settled that res judicata is based on the public policy favoring finality in litigation and does not depend on the validity of the underlying judgment. See Turnbow v. Pacific Mut. Life Ins. Co., 934 F.2d 1100, 4103 (9th Cir. 1991). Second, it is even more settled that the "federal district courts have no authority to review final judgments of a state court even when federal constitutional principles are involved." Palomar, 989

F.2d at 365 (citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484-85 (1983)). Thus, even assuming that plaintiff is correct and the state courts were bound to follow the federal relation back doctrine with respect to its federal claims and that the state courts applied it incorrectly, this Court may not review that decision. Instead, the proper federal forum, if any, for review of the state court's judgment is the United States Supreme Court. Id.

Furthermore, the Court notes that this is not a case where the state has employed a procedural rule to thwart federal rights in a systemic fashion. See McCurry, 449 U.S. at 100-101. Indeed, as plaintiff argues, the state courts were simply wrong in their holding that plaintiff could not amend its pleadings to assert its federal claims.[6] That the state courts were wrong, however,

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[6]Pursuant to Tenn. R. Civ. P. 15.03, only those claims that relate back to the original pleadings are saved from the effects of the applicable statute of limitations. Under Tennessee law, a claim relates back if it arises from the same conduct, transaction, or occurrence as set forth in the original pleadings. Karash v. Pigott:, 530 S.W.2d 775 (Tenn. 1975). In affirming the Circuit Court 's decision to dismiss, however, the Tennessee Court of Appeals held that "the Tennessee Supreme Court has determined that notice is the critical element involved in determining whether the amendments to pleadings relate back." Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment, 821 S. W. 2d 938, 942 (Tenn. Ct. App. 1991) (citing Floyd v. Rentrop, 675 8.W.2d 165, 168 (Tenn. 1984)). A review of Floyd, however, reveals that the plaintiff in that case sought to add a party to the action and not legal claims as here. In cases where

does empower this Court to review such a decision. To hold otherwise would require the federal district courts to review all state court decisions that dismissed any federal claims on a procedural ground. For obvious reasons, the Court declines plaintiff's invitation to transform the federal district courts into state appellate courts. Palomar, 989 F.2d at 366.

Finally, plaintiff seeks to challenge the state court proceedings on the grounds that even though "the state court found a constitutional violation, it erroneously and in violation of federal and state law refused to grant any monetary relief when it held that Rainey Bros.' damage claim was barred by the general immunity afforded to a municipality by [Tenn. Code Ann. § 29-20-205.]" Pl.'s Mem. at 10. Although the Court agrees with plaintiff that this decision was erroneous, see McKenna v. City of Memphis, 544 F. Supp. 415, 419 (W.D. Tenn. 1982) (holding that the Tennessee Governmental Tort Liability Act does not apply to inverse condemnation claims or due process claims arising under 42 U.S.C. § 1983), aff'd 785 F.2d 560 (6th Cir. 1986), that decision is not reviewable by this Court for the same reasons set forth above. Moreover, even if this Court could review this decision under certain circumstances,

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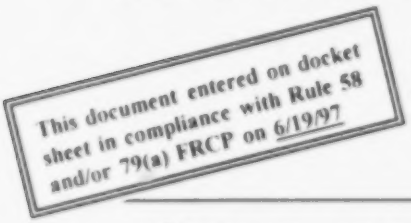
the plaintiff seeks to add a party, notice is indeed a critical element under Tennessee law. In cases where the plaintiff seeks to add legal claims, however, it is well settled that notice is not a required element. E.g., Karash, 530 S.W.2d 775; Branch v. Warren, 527 S.W.2d 89, 91 (Tenn. 1975); Walden v. Wylie, 645 S.W.2d 247 (Tenn. Ct. App. 1982).

the Court would decline to do so under the circumstances of this case. As noted above, plaintiff's state appeal from the Circuit Court's decision to dismiss its damage claim was dismissed on the grounds that plaintiff had failed to file the transcript with the court pursuant to Tenn. R. App. P. 24(a). In essence, therefore, plaintiff has procedurally defaulted whatever argument it may have had to assert a claim in this Court.[7]

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is GRANTED, and this case is DISMISSED.
IT IS SO ORDERED this ___ day of June 1997.



\s\ Jon P. McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

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[7]Defendants seek to extend this rationale to the entire case. As plaintiff correctly notes, however, the dismissal of its proposed federal claims was the subject of an interlocutory appeal. Accordingly, under Tennessee law, that issue became the law of the case once that interlocutory appeal process was exhausted, and plaintiff could not have reargued those issues in its subsequent appeal from the final dismissal. See Clements v. Pearson, 352 S.W.2d 236, 237 (Tenn. 1961) ("A ruling or decision once made in a particular case by an appellate court, while it may be overruled in other cases, is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.").

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Rainey Brothers Construction Company, Inc. *Plaintiff-Appellant,*	)	Judgment In A Civil Case
v.	)	
	)	Case No. 96-3156
Memphis and Shelby County Board of Adjustment; and City of Memphis, Tennessee *Defendants-Appellees.*	)	M1-V

Filed
97 Jun 19

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order granting Defendants' Motion to Dismiss or, in the Alternative, For Summary Judgment, entered June 18, 1997, this cause is hereby **DISMISSED WITH PREJUDICE.**

APPROVED:
/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE
JUNE 18, 1997

/s/ Robert R. Di Trolio
Clerk of Court

/s/ Wendy Warren
(By) Deputy Clerk

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 6/19/97.

Certified True Copy
Robert R. Di Trolio, Clerk; by: /s/ Vickie Mills

Certified True Copy
Robert R. DiTrolio,
Clerk By: V. Mills

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,15 and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United

States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, or support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§2101. Supreme Court time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgement or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action suit or proceeding, shall be taken within thirty days from the judgement, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time of for appeal or application for a writ of certiorari to review the judgement of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time toe enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted thereof, or fails to obtain an order plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constituion, laws, or treaties of the United States.

§1343. Civil rights and elective franchise

(a) The district courts shall be original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section --

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State. Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

§ 1983
Civil action for deprivation of rights

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of titles 13, 24 and 70 of the Revised Statutes of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in remedies and punish offenses against law, the common law, a modified and changed by the constitution and statues of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], Title VI of the Civil Rights Act of 1964 (42 U.S.C.

2000d et seq.] or section 13891 of this title,1 the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action of proceeding to enforce a provision of section 1982 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

29-16-123. Action initiated by owner. ---

(a) If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

(b) Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under subsection (a) of this section, arising out of a cause of action identical to a cause of action that can be brought against the United State under 28 U.S. C. § 1345(a)(2) or § 1491, or the attorney general or chief legal officer of a political subdivision of the state effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court, or the attorney general or chief legal officer of a political subdivision of the state reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

§29-20-103

29-20-103. Application of chapter. —

(a) (1) Any governmental entity may exempt itself from the provisions of this chapter by action of its legislative body if such action is taken by January 1, 1975; provided, that §§ 7-31-103, 7-31-112, 7-51-202 (repealed) and 7-51-203, shall apply to any governmental entity exempting itself from the provisions of this chapter.

(2) Any governmental entity exempting itself from the provisions of this chapter may be resolution of its governing body elect at any time to come under the provisions of this chapter, provided that this chapter would only apply to claims or actions arising after the effective date of such resolution.

(b) After January 1, 1976, this chapter shall apply to all governmental entities as defined herein, provided that as to those governmental entities exempting themselves, as provided for in the preceding subsection, this chapter will only apply to claims or actions arising after January 1, 1976.

(c) Nothing in this chapter shall be deemed to deprive any person of any cause of action or damages to which they are otherwise entitled arising under the federal civil rights acts of 1871 and 1964 as amended.

§29-20-105

29-20-105. Inverse condemnation not affected. --- This chapter shall not apply to any action in eminent domain initiated by a landowner under §§ 29-16-123 and 29-16-124 nor be construed to impliedly repeal this statutes.

§29-20-205

29-20-205. Removal of immunity for injury caused by negligent act or omission of employees — Exceptions. — Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:

(1) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(2) Arises out of false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

(3) Arises out of the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;

(4) Arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;

(5) Arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probably cause;

(6) Arises out of misrepresentation by an employee whether or not such is negligent or intentional;

(7) Arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or

(8) Arises out of or in connection with the assessment, levy or collection of taxes.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or part thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had to may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 15.03

15.03. Relation Back of Amendments. — Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back of the foregoing provision is satisfied and if, within the period provided by law for commencing an actin or within 120 days after commencement of the action, the party to be brought in by amendment(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.